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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-180.

GATEWAY CENTER CORPORATION,
Petitioner,

AND

ROBERT L. KUNZIG, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, *et al.*

v.

JOHN W. MERRIAM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The petition correctly sets forth the opinions below except to the extent that Petitioner infers by the use of the word "defendants" that it was a party to any proceedings in this case prior to June 28, 1973. Until that date (more than sixty days after the last proceeding in the Circuit Court) the only defendants were the government officials and the General Services Administration (hereinafter referred to as "Government Respondents").

JURISDICTIONAL STATEMENT.

Respondent respectfully suggests that this Court lacks jurisdiction to grant certiorari, because Petitioner is not a "party" within the meaning of 28 U. S. C. § 1254(1). That statute confers jurisdiction to review this decision of the Circuit Court:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

In September, 1971 Respondent commenced this suit against the Government Respondents alleging that they violated a statutory mandate in the awarding of a lease valued in excess of fifty million dollars. The complaint alleges the Government Respondents accepted the offer with full knowledge of the fact that Petitioner had made false statements of material facts in its offer. (Supplemental Appendix 18a-32a). Respondent seeks the cancellation of the lease and a resolicitation of offers limited to those offerors who were qualified as of the date the original period closed. No claim for relief is made against Petitioner, at least in this lawsuit.

Following the institution of the suit numerous proceedings in the district court were conducted between the Respondent and the Government Respondents and on June 26, 1972 the district court dismissed Respondent's complaint on the motion of the Government Respondents for summary judgment. (Supplemental Appendix 1a-12a). An appeal followed and protracted appellate proceedings ensued between Respondent and Government Respondents in the United States Court of Appeals for the Third Circuit. (Supplemental Appendix 13a-17a). The case was remanded to the district court on May 8, 1973. On June 26, 1973, Petitioner moved to intervene as a party defendant, which

motion was granted on June 28, 1973. One month later Petitioner, the intervenor-defendant, filed this petition.

Respondent submits that the Petitioner does not have sufficient status as a "party" within the meaning of 28 U. S. C. § 1254(1) to justify the filing of this petition. For nearly two years this case has been in the federal courts. During that time Respondent and the Government Respondents have pursued basically, the resolution of one question: the Respondent's standing as a unsuccessful offeror to bring this action. Throughout the protracted litigation on this question in both lower courts, Petitioner did not seek to be heard (even as an amicus curiae). Since Petitioner was not a "party" at any point in this litigation to the resolution of the issue now sought to be reviewed, it cannot properly invoke the jurisdiction of this Court to grant the writ.

The limited basis on which Petitioner sought intervention in the district court was for the purpose of protecting its interest in the lease which Respondent seeks to have invalidated (Supplemental Appendix 33a-34a). Petitioner's intervention as of right (F. R. C. P. 24(a)) is indeed appropriate, since the litigation is proceeding to a determination on the merits. Petitioner's motion does not remotely suggest the possibility that it has an interest in the question of standing in government contract cases. Therefore, in no sense can Petitioner be considered a "party" to the decision for which review has been sought.

Significantly, the Government Respondents have not filed a petition with this Court and have refrained from joining with Petitioner in its request. The Government Respondents' failure to do either, after vigorously contesting the issue in the lower court suggests that they now acknowledge that they have obtained appellate consideration sufficient to protect their interests. Indeed, the only party having an interest in whether an unsuccessful offeror

has standing to contest the legality of a contract award is the General Services Administration.

Finally, Petitioner makes no claim that the Government Respondents' representation on this issue was or is inadequate, *Smuck v. Hobson*, 408 F. 2d 175 (D. C. Cir. 1969) or that important interests of Petitioner would be prejudiced by the failure of the Government Respondents to seek review by this Court, *Hurd v. Ill. Bell Tel. Co.*, 234 F. 2d 942 (7th Cir. 1956), *cert. den. sub nom. Seybold v. Western Elec. Co.*, 352 U. S. 918 (1956). Whatever important interests Petitioner possesses (which are not otherwise foreclosed by its fraud and wrongdoing) relate to the merits of the controversy, and not to the issue of standing.[1]

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1. The answer to the complaint which Petitioner filed admitted that the court has jurisdiction over this controversy (Supplemental Appendix 36a). Standing, of course, relates to the case or controversy requirement of Article III of the United States Constitution. Thus, the position which Petitioner takes here is the complete reverse of the concession made in the district court.

STATEMENT OF THE ISSUES.

1. Whether Respondent, an unsuccessful offeror of office space to the government has standing to challenge the Government Respondents' award of a twenty year lease to Petitioner, on the grounds that the award was illegal because it violated the express terms of an Act of Congress and because the successful offeror falsely represented the existence of material facts with the knowledge of the Government Respondents?

2. Whether the Government Respondents' unlawful and unauthorized award of a lease to Petitioner in violation of the Independent Offices Appropriations Act of 1970 (which was a limitation on the authority of the Government Respondents to make this award) was ratified by the passage of the Public Building Act Amendments of 1972?

STATUTES INVOLVED.

Petitioner has correctly stated that the statutes involved are the Public Buildings Act Amendments of 1972 (Appendix 16a), section 10 of the Administrative Procedure Act (Appendix 4a) and the Federal Property and Administrative Services Act, 41 U. S. C. § 252-53 (Appendix 1a-2a).

The Independent Office Appropriations Act of 1971 and 1972 (Appendix p. 10a, 13a) have nothing to do with this litigation. Respondent's complaint arises under the Independent Office Appropriations Act of 1970, 83 Stat. 1221.1 and the provisions of the Public Buildings Act of 1959 referred to therein (Supplemental Appendix 21a). These statutes are set forth in Respondent's Supplemental Appendix at 39a-40a.

The Fifth Amendment to the Constitution of the United States and Federal Procurement Regulation, 41 C. F. R. § 1-3.805-1 have never been involved in these proceedings and are irrelevant.

STATEMENT OF THE CASE.

Respondent, the owner of an office building in Philadelphia, was one of five offerors who responded to a government solicitation, dated September 30, 1970, to lease approximately 314,000 square feet of office and related space for use by federal agencies. Respondent's submission, as finally negotiated, offered space in an existing building, whereas Petitioner's offer contemplated the construction of a new building costing in excess of $10,000,000. The Government Respondents accepted Petitioner's offer despite the fact that the selection of Respondent would have saved the government several million dollars over the life of the twenty-year lease.[2] Additionally, the Department of Housing and Urban Development was already a tenant in Respondent's building occupying nearly one-third of the total space required by the solicitation. The selection of Respondent's offer thus had the added advantage of saving the cost of relocating HUD (Supplemental Appendix 21a).

The award to Petitioner was made on February 18, 1971. On the following day, Respondent protested the award to the General Accounting Office. On September 16, 1971, after seven months of consideration, the General Accounting Office advised Respondent that it would not rule on his protest (Appendix 20a-21a).[3] On the same day, Respondent commenced this action. The complaint alleges

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2. The Government agreed to pay $2,316,000 annually to Gateway on February 18, 1971. Subsequent offers to lease additional space for more than $330,000 annually were accepted subsequently.

3. On March 17, 1972 the General Accounting Office rendered a decision on Respondent's protest, the district court having ordered that all proceedings would be stayed until it did so. In that decision the GAO found that the agreement to lease was improper (Appendix 19a). See text, *infra*.

that the Government Respondents acted capriciously, arbitrarily and illegally, in accepting Petitioner's offer.

The gravamen of the complaint is that the Government Respondents violated the Independent Offices Appropriations Act of 1970 (hereinafter I. O. A. A. of 1970) which prohibits the General Services Administration from paying rent for the leasing of space for the accommodation of federal agencies in a building which is to be erected by the lessor for such agencies, where the estimated cost of construction exceeds $200,000[4] (Supplemental Appendix 18a-22a). Alternatively, the complaint alleges that the Government Respondents, without congressional authorization, interpreted the I. O. A. A. of 1970 so as to permit the awarding of this lease to Petitioner without the prior approval of Congress as was required by that Act and moreover counseled Petitioner in the circumvention of the Act by the use of certain administrative criteria known as "the five points" (Supplemental Appendix 22a-24a). Finally, Respondent alleges that not only did the Government Respondents permit Petitioner to satisfy the five points (rather than to adhere to the I. O. A. A. of 1970) but accepted Petitioner's offer knowing that it had not complied with the five points and, more significantly, knowing that Petitioner had falsely represented the existence of certain facts by certifying that it had complied with the five points (Supplemental Appendix 24a-30a).

The complaint seeks a declaration that the acceptance of Petitioner's offer was null and void and requests the court to order GSA to reconsider only those offers which were responsive to the solicitation on the date that the bid period closed (Supplemental Appendix 31a). On Novem-

4. The purpose of the statute is to avoid having the government finance the construction of a privately-owned building with the security of a long-term lease.

ber 19, 1971,[5] the Government Respondents filed a motion for summary judgment.[6]

On February 7, 1972, the district court stayed all proceedings and ordered the General Accounting Office to decide Respondent's protest which had been then pending for almost one year (Supplemental Appendix 5a). On March 17, 1972, the GAO announced its decision on the protest. It stated that the Government Respondents' award of the lease to Petitioner was "*. . . improper by reason of Gateway's [Petitioner] non-compliance with some of the criteria as of the date specified. . . .*" (Appendix 33a) (Emphasis added.) With respect to the Government Respondents' administration of the Appropriation Act in the context of this protest, the GAO stated that to support the position of the Government Respondents, "*. . . would sanction a complete evasion of the Appropriation Act Limitation.*" (*Ibid.*) (Emphasis added.) In spite of these findings, the GAO declined to order any action to rectify the improprieties in the lease award; thus, the matter returned to the district court for consideration.

On June 26, 1972, the district court granted the Government Respondents' motion for summary judgment and

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5. Petitioner's assertion on page 5 of the Petition that the motion for summary judgment that was filed on November 1, 1971 is erroneous (Supplemental Appendix 3a).

6. Petitioner's statement that there was an allegation by Government Respondents that the issue was moot is erroneous. This issue was *not* raised at any time before the district court in 1971 and 1972 (Petition, p. 5).

Petitioner's discussion of 41 U. S. C. § 252-53 in its statement of the case is inappropriate (Petition, p. 5). The question of whether or not GSA should have formally advertised for bids as opposed to proceeding to negotiate is not before this Court. That question was not raised in the complaint, nor referred to in the Government Respondent's motion for summary judgment. There is nothing in the record that would indicate why GSA proceeded with negotiation rather than advertising, and Petitioner's speculations as to why this was done are irrelevant.

dismissed the complaint on the ground that Respondent lacked standing to sue. On appeal to the United States Court of Appeals for the Third Circuit, that court reversed the district court on February 16, 1973. The petition for rehearing filed by the Government Respondents was denied on April 27, 1973, and the case was remanded to the district court (Supplemental Appendix 17a). Petitioner intervened as a party defendant on June 28, 1973 filed its answer to Respondent's complaint on July 24, 1973, and petitioned this Court for certiorari on July 26, 1973 (Supplemental Appendix 12a).

ARGUMENT.

I.

The Decision of the Court Below Is Completely Consistent With the Standing Doctrine as Enunciated by This Court.

Petitioner advances *Perkins v. Lukens Steel Co.*, 310 U. S. 113, which was decided in 1940, as a decision of the Supreme Court with which the opinion of the Court below conflicts. In its enthusiasm for *Perkins*, Petitioner has failed to take into account the dramatic metamorphosis in the jurisprudence standing, brought about by this Court's historic decision of *Flast v. Cohen*, 392 U. S. 83 (1968). Article III requires only that a litigant "allege such a personal stake in the outcome of the controversy" so as to assure concrete adversity in the presentation of the issues: injury in fact. *Flast, supra* at 99. The Court's subsequent decisions in *Ass'n. Data Processing Serv. Organization, Inc. v. Camp*, 397 U. S. 150 (1970), *Barlow v. Collins*, 397 U. S. 159 (1970) and *Investment Company Institute v. Camp*, 401 U. S. 617 (1971) have employed the criteria of "injury in fact" in a variety of applications and have broadened the concept of injury to include non-economic injury. However, economic injury, such as Respondent has suffered, has "long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." *Sierra Club v. Morton*, 405 U. S. 727, 733-34 (1972).

Taken together, these cases established the proposition that a litigant will have standing (1) who is injured in fact (2) and who can argue that he is within the zone of interests of the statute which he claims is violated. Both the circuit and the district courts held that Respondent had been injured in fact when the Government Respondents awarded

Petitioner the lease. Not only was Respondent deprived of a potentially beneficial business relationship by the wrongful conduct of the Government Respondents (as found by both courts) but also on the economic injury sustained in the termination of a presently advantageous relationship which Respondent had with the government (landlord-tenant) (Appendix 81a). Respondent satisfies the zone of interests requirement because the procurement statutes were certainly not drawn solely for the benefit of the government. G. S. A.'s continuing ability to secure advantageous contracts depends upon there being "full and free competition" (Appendix 80a). Contracts and leases awarded unlawfully and on the basis of false statements of fact confer on the unsuccessful offeror an interest, if not a right, to seek judicial redress for the damage sustained thereby.

II.

The Decision of the Court Below Does Not Conflict With Any Other Circuit Court Decision.

Two Circuits have considered the question of the standing of a person who unsuccessfully offers to do business with the goverment: the Third Circuit in the instant case, and the District of Columbia Circuit in *Scanwell Labs, Inc. v. Shaffer*, 424 F. 2d 859 (D. C. Cir. 1970). The *Scanwell* decision was nothing more than an application of the classic doctrine of standing in the context of government contract litigation. It held that a disappointed bidder "has standing to challenge the illegal grant of a contract to another." *Id.* at 870. In a lengthy well-reasoned opinion, that court held that the plaintiff has a "prospective beneficial relationship" when he submits an offer to do business with the government. He suffers economic injury when that potential relationship is frustrated by the award of a contract

to another. *Scanwell, supra* at 870. The court finds that unsuccessful bidders are within the umbrella of interests served by the procurement statutes because the bidder who sues will "... satisfy the public interest in having agencies follow the regulations which control government contracting." *Id.* at 864. See, *Superior Oil Co. v. Udall*, 409 F. 2d 1115, 1120 (D. C. Cir. 1969) (opinion by Burger J. holding that there must be "steadfast compliance" with the procurement laws). The *Scanwell* Court concluded that:

> The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity. *Id.* at 864

Subsequent decisions of that court and others cited in the Petition (page 9 fn. 1) reinforced the application of the standing doctrine to government contract litigation. See, *e.g., Ballerina Pen Co. v. Kunzig*, 433 F. 2d 1204 (D. C. Cir. 1970).

Petitioner draws an illusory distinction between "advertised" bids and "negotiated" contracts based upon an earlier decision of the District of Columbia Circuit in *Friend v. Lee*, 221 F. 2d 96 (D. C. Cir. 1955). The *Scanwell* Court draws no such distinction which is obvious from the following quotation, from which Petitioner quoted only three lines (Petition, p. 14):

> The point on which we distinguished that case [*Friend*] is that here we have a situation in which explicit requirements of the bid were waived by the agency; this results in an allegation of *arbitrary and capricious misconduct*, an allegation not made in *Friend*. (Emphasis supplied.) *Scanwell, supra* at 869 fn. 10.

Here, of course, the complaint alleges not only arbitrary and capricious misconduct by the Government Respondents, but the making of an award knowing that the successful offeror had misrepresented material facts and that the successful offeror was counseled in the circumvention of the statute which was allegedly violated by the Government Respondents (Supplemental Appendix 23a). These allegations are sufficient to bring the instant case within *Scanwell*. There simply is no "sole [or any] distinction" between *Friend* and *Scanwell* based on negotiated versus advertised contracts (Petition, p. 14).

III.

Judicial Review of Illegal Agency Action Does Not Unduly Burden the Court.

It is specious to argue that the Respondent, who was economically damaged, does not have the right to challenge acts done in violation of a statutory mandate because to do would disrupt the government procurement process (Petition, p. 15). Here, there is not one shred of evidence of disruption of the procurement process. Even if there were, the Courts cannot stand by idly in the face of government misconduct. On the contrary, the judiciary ". . . must require that creating, enabling and empowering legislation is not desecrated beyond all possible recognition in the name of the public welfare and interest." *Ballerina Pen Co., supra* at 1208. The Courts must continue to protect the public "from excesses which hurdle the barrier set up by the creating statute and which allow decision-making, not on the basis of Congressional guidelines, but instead on the basis of personal insight, prejudice, predilection, or perhaps even visceral reaction". *Ibid.* This observation is particularly appropriate in a case of this kind where fraud is alleged.

It comes with some ill-grace to say in this era that the courts are unable to accommodate themselves to litigation which is designed ultimately to protect the public from government excesses (Petition, pp. 17-18). Indeed, such a position counters the trend established by this Court in expanding the role of judicial review of agency action. See, *e.g. Data Processing, supra* at 154: "Where statutes are concerned, the trend is towards enlargement of the class of people who may protest administrative action," and *Barlow, supra* at 166: "Indeed, judicial review of such administrative action is the rule, and non-reviewability is an exception which must be demonstrated."

IV.

The Legality of the Lease Transaction Is Controlled by the I. O. A. A. of 1970: It Is Unaffected by Subsequent Legislation.

The basic statute regulating government contracting is found at 41 U. S. C. § 11(a):

> No contract or purchase shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment.

The leasing authority of the G. S. A. was greatly restricted by the I. O. A. A. of 1970 (Supplemental Appendix 39a-40a). That act forbids the use of any appropriation for the payment of rental in buildings to be built by the lessor for the accommodation of federal agencies where the estimated cost exceeds $200,000, unless congressional approval is first sought in accordance with the provisions of the Public Buildings Act of 1959, 40 U. S. C. § 606 (Supplemental Appendix 39a-40a). The I. O. A. A. of 1970 is an absolute bar on lease agreements of this kind, unless prior congressional approval is obtained. Concededly, no ap-

proval was sought by the Government Respondents for the award of a lease to Petitioner who built a building costing in excess of $10,000,000 and which government agencies house almost exclusively. In *Robert F. Simmons & Associates v. United States*, 360 F. 2d 962, 965 (Ct. Cl. 1966) this same language was construed as prohibiting the G. S. A. from creating a binding contract "in the absence of prior congressional approval." Petitioner argues that since no money was expended under the Act for the payment of rent, the Act has no application to this controversy. Plainly, the contention is without merit. If the Act were a limitation on the authority of the GSA to make a contract in 1971, that infirmity is not cured by the fact that no money was paid under the lease.

Next, Petitioner states that Respondent complains that the contract violates the Public Building Act Amendments of 1972, which became effective on June 16, 1972. The complaint made no such contention; indeed, the Act was not even in existence at the time the complaint was filed. The new Act may become an issue in further proceedings in the district court, but a consideration of this question is premature. The circuit court merely decided that the passage of the Public Building Act Amendments of 1972 did not moot the controversy (A. 84a). Furthermore, Petitioner's argument that it has been deprived of property in violation of the Fifth Amendment (Petition, p. 21) is groundless: once again, all that has been decided is the issue of mootness and the Respondent's standing to sue. Until there is a judgment on the merits in Respondent's favor, there will be no taking of Petitioner's property and then, not without a full hearing.

V.

This Case Is Not Ripe for Review by Certiorari.

The present posture of this case is that the Third Circuit has reversed the district court's order granting the Government Respondents motion for summary judgment. It has held that Respondent has standing, has reinstated the complaint, and has remanded the case for further proceedings in the district court (Appendix 84a). In the absence of some exceptional reason, this Court should not grant certiorari to review a judgment which is interlocutory. No exceptional reason has been advanced by Petitioner, nor does one appear in this record. Lack of finality in the judgment sought to be reviewed is alone a sufficient basis on which to deny the Petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251 (1916); *Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R. R.*, 389 U. S. 327 (1967).

CONCLUSION.

For the foregoing reasons, it is respectively submitted that this Petition for a Writ of Certiorari be denied.

Respectively submitted,

C. Clark Hodgson, Jr.,
Jeanne Ward Ryan,
Attorneys for Respondent,
John W. Merriam.

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Supplemental Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 71-2262.

JOHN W. MERRIAM,

Plaintiff,

v.

ROBERT L. KUNZIG, ETC. ET AL.,

Defendants.

DOCKET ENTRIES.

1 September 16, 1971. Complaint filed.
September 16, 1971. Summons exit.

2 October 5, 1971. Plff's notice of deposition of Allan C. Kirkman, filed.

3 October 13, 1971. Summons returned "on 9/20/71 served U. S. Attorney, Phila., Pa.; on 9/22/71 served L. M. Shipp by certified mail; on 9/22/71 served General Services Admin., Robert L. Kunzig, A. J. Sampson, Attorney General of U. S., Wash., D. C., all by certified mail", filed.

4 October 20, 1971. Plff's notice of deposition of Allan C. Kirkman, filed.

5 November 3, 1971. Plff's notice of deposition of Nowicki & Polillo, filed.

6 November 3, 1971. Plff's notice of deposition of Redevelopment Authority of the City of Phila., filed.

7 November 3, 1971. Plff's notice of deposition of Clarence A. Dockens, filed.

8 November 3, 1971. Plff's notice of deposition of McCullough-Howard Co. & Inc., filed.

9 November 3, 1971. Plff's notice of deposition of University City Science Center, filed.

10 November 9, 1971. Objection of Allan C. Kirkman & The Provident Nat'l Bank to inspection and copying of materials, filed.

11 November 15, 1971. Plff's notice of deposition of Nowicki & Polillo, filed.

12 November 15, 1971. Plff's notice of deposition of McCullough-Howard Co. & Inc., filed.

13 November 15, 1971. Plff's notice of deposition of University City Science Center, filed.

14 November 16, 1971. Motion of Allan C. Kirkman and Provident National Bank for Protective Order and Motion to Quash, Affidavit of Allan C. Kirkman, Brief in support of and Notice thereof, and Certificate of Service, filed.

15 November 16, 1971. Plff's Brief contra Motions of Provident National Bank & Allan C. Kirkman for Protective Order and to quash, filed.

16 November 17, 1971. Plff's Motion under Rule 57, filed.

17 November 17, 1971. Plff's Motion for Preliminary Injunction, filed.

18 November 18, 1971. Motion of Lawrence Polillo and Nowicki & Polillo for Protective Order and Motion to Quash, Brief in support of, and Notice thereof, and Certificate of Service, filed.

19 November 19, 1971. Plff's notice of deposition of Chris G. Papazickos, filed.

20 November 19, 1971. Defts' Motion for Summary Judgment, Memorandum in support of, and Affidavits of L. M. Shipp, Jr. and A. F. Sampson, filed.

21 November 23, 1971. Motion of James M. McCullough and McCullough-Howard & Co, Inc. for Protective Order and Motion to Quash, Brief in support of, Notice thereof, and Certificate of Service, filed.

22 November 23, 1971. Plff's notice of deposition of Chris G. Papazickos, filed.

23 November 23, 1971. Defts' reply to Plff's Motion under Rule 57, filed.

24 November 23, 1971. Defts' reply to Plff's Motion for Preliminary Injunction, filed.

25 November 29, 1971. Objections of James M McCullough and McCullough-Howard Co., Inc., to inspection and copying of materials pursuant to FRCP 45(d), filed.

26 December 8, 1971. Reply Brief of Allen C. Kirkman and The Provident National Bank, filed.

27 December 13, 1971. Plff's Brief contra Defts' Motion for Summary Judgment, filed.

28 December 13, 1971. Affidavit of C. Clark Hodgson, Jr., Esq. re contra Defts' Motion for Summary Judgment, filed.

29 December 13, 1971. Affidavit of John W. Merriam re contra Defts' Motion for Summary Judgment, filed.

30 December 13, 1971. Affidavit of Edward B. Todd, re contra Defts' Motion for Summary Judgment, filed.

31 December 15, 1971. Affidavit of Douglas M. Parker re Plff's protest filed with General Accounting Office of the U. S., filed.

32 December 15, 1971. Deposition of Raymond M. Tate, Jr., filed.

33 December 15, 1971. Deposition of Chris G. Papazickos, filed.

34 December 15, 1971. Pre-Trial oral examination of James McCullough, filed.

35 December 17, 1971. Memorandum of Conference, re Motions for Protective Orders, with approval of Court, filed.

36 December 21, 1971. Pre-trial oral examination of Chris G. Papazickos, filed.

37 December 23, 1971. Defts' reply and supplemental brief & affidavit of A. F. Sampson re: affidavit of 11-1-71 etc., filed.

38 January 7, 1972. Order dtd 1/6/72 that supplemental briefs from Plff. & Defts. supporting positions re Motion for Summary Judgment must be filed by 12 Noon, 1/21/72, filed. 1/10/72 entered and copies mailed.

39 January 21, 1972. Supplemental Affidavit of John W. Merriam, filed.

40 February 8, 1972. Order dtd 2/7/72 that Court will STAY its hand for 30 days, etc., filed. 2/8/72 entered and copies mailed.

41 March 10, 1972. Stipulation and Order extending Order of 2/7/72 to 3/20/72, etc., filed.

— April 21, 1972. Argued sur Defts' motion for summary judgment. . . . C. A. V.

42 April 25, 1972. Stipulation of counsel re decison of Gen. Acct. Office responding to protest filed by Plff., filed.

43 June 23, 1972. Plff's supplemental brief in Opposition to Defts' Motion for Summary Judgment, filed.

44 June 23, 1972. Defts' second supplemental Memorandum in support of the Motion for Summary Judgment, filed.

45 June 26, 1972. Certified copy of General Accounting Office documents, filed.

46 June 26, 1972. Opinion, Hannum, J., and Order DISMISSING Plff's complaint, filed. 6/26/72 entered and copies & notice mailed.

47 June 29, 1972. Notice of Appeal, of Plff., filed. 6/30/72 entered and copies mailed to U. S. Court of Appeals, and U. S. Attorney . . other counsel.

48 June 29, 1972. Copy of Clerk's Notice to U. S. Court of Appeals, filed. 6/30/72 entered and copy to Hannum, J.

— July 19, 1972. Record transmitted to U. S. Court of Appeals.

49 March 7, 1973. Plff deposition of McCullough-Howard Co., by James M. McCullough, filed.

50 March 7, 1973. Plff deposition of University City Science Center by Randall Whaley, filed.

51 March 7, 1973. Plff deposition of Nowicki & Polillo by Lawrence P. Polillo, filed.

52 March 7, 1973. Plff deposition of Provident National Bank by Allan C. Kirkman, filed.

53 March 9, 1973. Joinder of Randall Whaley and University City Science in motion for protective order filed on behalf of Allan C. Kirkman & Provident National Bank, filed.

54 March 9, 1973. Motion of Allan C. Kirkman for protective order pursuant to F. R. C. P. 26(c), brief in support & conclusion, filed.

55 March 9, 1973. Motion of McCullough-Howard & Co. Inc., for protective order pursuant to F. R. C. P. 26(c) brief in support of & notice, filed.

56 March 12, 1973. Govt memorandum, filed.

57 March 12, 1973. Govt motion for protective order, filed.

58 March 12, 1973. Plff answer to defts motion for protective order, filed.

59 March 12, 1973. Plff memorandum of law, filed.

60 March 14, 1973. Answer of McCullough-Howard & Company Inc., & James McCullough to Plff's

motion for leave to take depositions & memorandum of law in opposition thereof, filed.

61 March 15, 1973. Plff motion for leave to take depositions pursuant to rule 27(b), Filed.

62 March 15, 1973. Plff's memorandum of law in support of his motion under rule 27(b), filed.

63 March 15, 1973. Defts answer to plff's motion for leave to take depositions pursuant to rule 27(b), filed.

64 March 15, 1973. Answer of Allan Kirkman & Matthew Weinstein to plff's motion for leave to take depositions pursuant 27(b), filed.

65 March 15, 1973. Memorandum filed by counsel for Lawrence Polillo, of Nowicki & Polillo filed.

— March 15, 1973. Argued sur: plff's motion for leave to take depositions and all defts motion's as filed for protective order—C. A. V.

66 March 23, 1973. Witnesses' brief contra plff's motion for leave to take depositions, filed.

67 April 5, 1973. Certified copy of Order that subpoenas to produce documents & testimony on depositions is stayed pending issuance of mandate of this court, filed.

68 April 5, 1973. Transcript of March 14, 1973 filed.

69 April 6, 1973. Order Denying Plff motion for leave to take depositions, filed. 4-9-73 entered & copies mailed.

70 May 8, 1973. Certified copy of order from U. S. Court of Appeals that judgment of this court

is REVERSED & cause remanded for further proceedings & costs taxed against appellees, filed.

71 May 17, 1973. Plff's notice of deposition of Custodian of Records of First Pa. Banking & Trust Co., filed.

72 May 17, 1973. Plff's notice of deposition of Robert S. Irving, filed.

73 May 17, 1973. Plff's notice of deposition of Nowicki & Polillo, filed.

74 May 17, 1973. Plff's notice of deposition of Asst Vice-Pres. of Provident Nat'l Bank, Allan C. Kirkman, filed.

75 May 17, 1973. Plff's notice of deposition of University City Science Center by Randall M. Whaley, filed.

76 May 17, 1973. Plff's Notice of deposition of James Crawford, filed.

77 May 17, 1973. Plff's notice of deposition of James McCullough, filed.

78 May 21, 1973. Plff's notice of deposition of James Bodine, filed.

79 May 22, 1973. Affidavit of service by Edmund L. Harvey Jr., re: served subpoena on Lawrence Polillo, filed.

80 May 23, 1973. Govt's motion for protective order, memorandum, notice thereof & certificate of service, filed.

81 May 23, 1973. Plff's motion for preliminary injunction, filed.

82 May 24, 1973. Joinder of Randall Whaley & University City Science Center in motion for protective order filed on behalf of USA & Provident National Bank & Allan C. Kirkman & notice thereof, filed.

83 May 24, 1973. Affidavit of Anthony Walton, filed.

84 May 24, 1973. Affidavit of John W. Merriam, filed.

85 May 24, 1973. Motion of Allan C. Kirkman & Provident Nat'l Bank for protective order, notice of filing brief & motion & certificate of service, filed.

86 May 24, 1973. Motion of Lawrence P. Polillo for protective order, notice of filing & motion & certificate, filed.

87 May 25, 1973. Joinder of J. Bodine & The First Penna. Banking & Trust Co. in motion for protective order filed o nbehalf of the USA & others & notice thereof, filed.

88 May 25, 1973. Plff's response to defts' motion for protective order, filed.

89 May 25, 1973. Plff's memorandum in apposition to motion for protective order, filed.

90 May 29, 1973. McCullough-Howard & Co.,'s motion for protective order, notice, brief in support thereof & certificate of service, filed.

91 May 30, 1973. Plff's motion to compel the taking of the deposition of James Crawford notice & certificate of service, filed.

92 May 30, 1973. Plff's memorandum contra motion for protective order filed by non-part witnesses, filed.

93 June 6, 1973. Plff's motion to compel the taking of depositions of First Pennsylvania Banking & Trust Company & James F. Bodine, memorandum of law, notice & certificate of service, filed.

94 June 6, 1973. Answer of McCullough-Howard & Co., Inc., to plff's motion to compel taking of deposition, notice & certificate of service & memorandum in opposition to plff's motion to compel discovery, filed.

95 June 7, 1973. Plff's motion to compel the taking of deposition of Nowicki & Polillo Lawrence Polillo, notice, certificate of service and memorandum, filed.

96 June 7, 1973. Plff's motion to compel taking of deposition of McCullough-Howard Construction Co., notice, certificate of service and memorandum, filed.

97 June 7, 1973. Plff's motion to compel taking deposition of Allan C. Kirkman, notice certificate of service and memorandum, filed.

98 June 12, 1973. Defts' Memorandum in opposition to plff's motion for preliminary injunction, filed.

99 June 20, 1973. Deft's. answer to plff's/ motion to compel taking of depositions, filed.

100 June 21, 1973. Plff's motion to compel the production of documents, memorandum and notice of filing brief and motion, filed.

101 June 22, 1973. Order that motions for protective Orders filed on behalf of General Service Administration, et al are DENIED; further that plff's motions to compel Discovery as to

General Services Administration et al are GRANTED, etc., filed. 6/25/73 entered & copies mailed.

June 25, 1973. ARGUED SUR: Govt's motion for protective Order. C. A. V.

June 25, 1973. ARGUED SUR: Provident National Bank's motion for protective order. C. A. V.

June 25, 1973. ARGUED SUR: Nowicki & Polillo's motion for protective order. CAV.

June 25, 1973. ARGUED SUR: Whaley's and University City's motion for protective Order. CAV.

June 25, 1973. ARGUED SUR: McCullough-Howard's motion for protective order. CAV.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking of deposition of James Crawford—CAV.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking of deposition of First Pennsylvania and James F. Bodine. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking of deposition of Nowick & Polillo. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking deposition of Mcullough-Howard Construction Co. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion to compel the taking depostiion of Allan C. Kirkman. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion for preliminary injunction Section A—Denied by the court from the bench. Section B—withdrawn by the plffs.

102 June 29, 1973. Order dtd 6/28/73, with Motion, Stipulation of counsel, and Memorandum of Law, that Gateway Center Corp. be permitted to intervene as party Deft. in this action, filed. 7/5/73 entered and copies mailed.

103 June 29, 1973. Withdrawal of appearance of Obermayer, Rebmann, Maxwell & Hippel, Esqs. and Appearance of Ballard, Spahr, Andres & Ingersoll, Esqs. for Allan C. Kirkman and The Provident National Bank, filed.

104 July 20, 1973. Plff's deposition of George T. Walker, filed.

105 July 23, 1973. Plff's deposition of Nowicki & Polillo, filed.

106 July 24, 1973. Answer of Gateway Center Corporation, filed.

107 July 26, 1973. Deposition of James D. Crawford, filed.

108 July 26, 1973. Notice of deposition of The Colonial Mortgage Service Company to be taken by plff., filed.

109 August 1, 1973. Deposition of Allan C. Kirkman, filed.

110 August 1, 1973. Deposition of Robert S. Krutsick, filed.

111 August 6, 1973. Plff's notice of deposition concerning records of McCullough-Howard Construction Company, filed.

112 August 6, 1973. Order that Motion for Recall of Mandate is DENIED by Gibbons, Circuit Judge, filed. [Certified copy] 8/7/63 Entered and copy to Hannum, J.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1686.

JOHN W. MERRIAM,
Appellant,

v.

ROBERT L. KUNZIG, ETC. ET AL.,
Appellees.

DOCKET ENTRIES.

August 8, 1972. Copy of Notice of Appeal, rec'd July 1, 1972, filed.

Record received July 19, 1972, filed.

Appearance of C. Clark Hodgson, Jr., Stradley, Ronon, Stevens and Young for appellant, filed.

Appearance of Kent Frizzell, George R. Hyde, Eva R. Datz; Dept. of Justice for appellees, filed.

August 11, 1972. Motion by appellant to expedite appeal, in which it states that counsel for appellees does not not object to an expedited hearing of this appeal, although counsel does object to any expedited briefing schedule, filed. (4 copies). Certificate of service attached.

August 25, 1972. Submitted on above motion. CLERK.

August 28, 1972. Order (CLERK) granting appellant's motion to expedite appeal; the briefing schedule required by the Federal Rules of Appellate Procedure is applicable in this case, and the case will be listed, upon completion of briefing, at the earliest convenience of the Court, filed.

September 15, 1972. Appendix, filed.

September 15, 1972. Brief for Appellant, filed.

September 18, 1972. Certificate of service of appellant's brief and appendix by mail on September 18, 1972, filed.

October 18, 1972. Brief for appellees, rec'd October 27, 1972, filed. Proof of service by mail on October 25, 1972 in letter dated October 25, 1972.

October 24, 1972. Acknowledgment of service of appellees' brief on October 20, 1972, filed.

November 11, 1972. Letter, dated November 9, 1972, from Eva R. Datz, Esquire, counsel for appellee, together with enclosure, received for the information of the Court. (2 copies). Proof of service in letter.

November 30, 1972. Reply brief for appellant, filed. (25 cc.).

December 1, 1972. Certificate of service of appellant's reply brief by hand delivery on December 1, 1972, filed.

December 7, 1972. Argued. Coram: Van Dusen, Gibbons and Hunter.

December 11, 1972. Letter, dated December 8, 1972, from Eva R. Datz, Esquire, counsel for appellee, received

for the information of the court. (4 copies). Proof of service in letter.

December 16, 1972. Letter, dated December 16, 1972, from C. Clark Hodgson, Jr., Esq., counsel for appellant, in response to Eva R. Datz's letter of December 8, 1972, received for the information of the Court. (4 copies).

February 16, 1973. Opinion of the Court (Van Dusen, *Gibbons* and Hunter) filed.

February 16, 1973. Judgment reversing the judgment of the District Court, filed June 26, 1972, and the cause remanded for further proceedings, in accordance with the opinion of this Court. Costs taxed against appellees, filed.

February 21, 1973. Bill of costs for appellant, filed. Certificate of service attached.

February 26, 1973. Motion by Federal appellees for leave to extend time for filing petition for rehearing to 14 days (to and including March 16, 1973), filed. (4 cc.). Certificate of service attached.

March 1, 1973. Response by appellant to appellees' motion for extension of time to file petition for rehearing, filed. (4 cc.). Certificate of service attached.

March 1, 1973. Order (Van Dusen, *Gibbons* and Hunter) granting federal appellees' motion for an extension of time to file a petition for rehearing to and including March 16, 1973, filed.

March 16, 1973. Petition by appellees for rehearing, filed. (25 copies). Proof of service in letter dated March 15, 1973.

March 9, 1973. Motion by Allan C. Kirkman, Ass't Vice-Pres. of the Provident National Bank, and the Provident National Bank for protective order pursuant to F. R. C. P., 26(c), filed. (8 cc.). Proof of service rec'd March 14, 1973.

March 9, 1973. Motion by McCullough-Howard and Co., Inc., with brief in support, for protective order pursuant to F. R. C. P., 26(c), filed. (8 cc.). Certificate of service attached.

March 9, 1973. Joinder of Randall Whaley and University City Science Center in motion for protective order filed on behalf of Allan C. Kirkman and Provident National Bank, filed. (8 cc.).

March 12, 1973. Answered by appellant to motion by Allan C. Kirkman and Provident National Bank for protective order, filed. (8 cc.). Certificate of service attached.

March 12, 1973. Answer by appellant to motion of McCullough-Howard & Co., Inc. for protective order, filed. (8 cc.). Certificate of service attached.

March 12, 1973. Answer by appellant to joinder of Randall Whaley and University City Science Center to motion for protective order filed by Provident National Bank, filed. (8 cc.). Certificate of service attached.

March 12, 1973. Memorandum of Law rec'd from appellant in opposition to motions for protective orders filed by Provident National Bank, McCullough-Howard Construction Co. and University City Science Center, filed. (8 cc.). Certificate of service attached.

April 2, 1973. Order (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn and Hunter) staying issuance of subpoenas directed to production of documents and testimony on depositions by Kirkman, Provident Nat'l Bank, McCullough-Howard & Co. and Randall Whaley and University City Science Center pending issuance of the mandate of this Court, filed.

April 2, 1973. Certified copy of above order to C. of D. C.

April 13, 1973. Order Amending Opinion filed February 16, 1973 (Van Dusen, *Gibbons* and Hunter, C.J.), filed.

April 27, 1973. Opinion on Petition for Rehearing (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn and Hunter with separate dissenting opinion sur the denial of the petition for rehearing en banc by Judge *Adams*), filed.

April 27, 1973. Order (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn and Hunter, C.J.) denying the petition for rehearing. Judge Adams dissents from this order, filed.

May 7, 1973. Certified Judgment in lieu of formal mandate issued, filed.

May 7, 1973. Record returned to Clerk of D. C.

May 8, 1973. Receipt for record, filed.

May 17, 1973. Appearance of Wallace H. Johnson and Edmund B. Clerk for appellees, filed.

May 17, 1973. Motion by appellees for Recall and Stay of Mandate, filed (4 copies) service attached.

May 18, 1973. Response by appellant to motion for recall of and Stay of Mandate filed. (4 cc) service attached.

July 26, 1973. Cert filed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 71-2262.

JOHN W. MERRIAN

v.

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, A. J. SAMPSON, COMMISSIONER, PUBLIC BUILDING SERVICE OF THE GENERAL SERVICES ADMINISTRATION, L. M. SHIPP, JR., ASSISTANT COMMISSIONER, SPACE MANAGEMENT OF THE GENERAL SERVICES ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA.

COMPLAINT.

COUNT I.

1. The plaintiff, John W. Merriam, an individual, is a taxpayer and citizen of the United States of America residing in Montgomery County, Pennsylvania which is located within the federal judicial district known as the Eastern District of Pennsylvania.

2. Defendant Robert L. Kunzig is the Administrator of the General Services Administration of the United States of America (hereinafter "GSA"). Defendant A. J. Sampson is the Commissioner of the Public Buildings Service of GSA. Plaintiff is informed and believes that L. M. Shipp, Jr. is an Assistant Commissioner of the GSA and at all

times material hereto was the contracting officer for the project described herein. Defendant General Services Administration is the agency of the United States which is charged with the responsibility, *inter alia*, for acquiring, leasing or otherwise providing space to be occupied for government purposes.

3. Jurisdiction of this action is based upon title 28 U. S. C. § 1331, § 1361, §§ 2201-02, title 41 U. S. C. § 11 and title 5 U. S. C. § 702. The matter in controversy exceeds $10,000.00, exclusive of interest and costs.

4. Plaintiff was, at all times material hereto, and is presently the owner of a twelve story office building located at Independence Square, Philadelphia, Pennsylvania and known as the Curtis Building.

5. On September 30, 1970, defendant GSA issued Solicitation for Offers No. NEG(70)-63 for office and related space to a number of prospective offerors in the Philadelphia area, including the plaintiff.

6. The Solicitation invited the prospective offerors to submit offers to defendant GSA to lease approximately 314,000 net useable square feet of office, storage and cafeteria space located in the City of Philadelphia for a term of 30 years with options for earlier renewals to be available for occupancy by July 1, 1972.

7. The Solicitation was designed to accommodate the new regional headquarters of the Departments of Housing and Urban Development, Health, Education and Welfare, Labor, and Office of Economic Opportunity. The need for this space arose in fidelity to a Presidential mandate dated March 27, 1969 to collocate the socio-economic government agencies in order to enhance the efficiency and effectiveness of the federal human resources programs and to improve service to the general public.

8. Plaintiff is informed, believes and therefore avers that during the fall of 1970, defendant GSA received offers from five offerors including Gateway Center Corp. (hereinafter "Gateway") and plaintiff's agent, Richard B. Herman & Co.

9. Plaintiff's agent's offer, as finally negotiated, proposed leasing defendant GSA sufficient space on contiguous floors in the Curtis building to meet government requirements, at the rate of $7.09 per net useable square foot, or an annual rental of $2,173,562.

10. Gateway's offer, as finally negotiated, proposed constructing at a cost in excess of ten million dollars, a fifteen story office building at 36th and Market Streets, in Philadelphia, in which, it was further proposed, that defendant GSA would lease fifteen floors containing 302,000 square feet of space at the rate of $7.67 per net useable square foot, or at annual rental of $2,316,000. The proposal promised completion of the fifteen story building so as to be ready for governmnet occupancy by July 1, 1972.

11. Plaintiff is informed, believes and therefore avers that defendant Sampson prepared a report dated February 18, 1971, recommending to defendant Kunzig that Gateway's offer be accepted. On the same day, defendant Kunzig approved defendant Sampson's recommendation. On the same day, defendant Sampson arbitrarily and illegally accepted Gateway's offer.

12. Gateway's offer was accepted notwithstanding the facts that:

(a) as between Gateway and plaintiff, the latter was the low bidder by nearly $150,000 per year for a twenty year lease;

(b) Gateway's bid offered only 279,000 net useable square feet, whereas plaintiff offered 306,378 square feet; the solicitation requested 314,000 square feet;

(c) The Department of Housing and Urban Development, one of the ultimate tenants, already occupied almost two floors of plaintiff's building, representing 96,643 square feet, which is nearly one-third of the total space required by defendant GSA in the Solicitation. Thus, leasing plaintiff's building offered defendant GSA substantial savings of the costs of relocating the Department of Housing and Urban Development.

13. Defendants' acceptance of Gateway's offer was illegal because it obligated the United States to make payments under the lease and to the lessor, Gateway, in violation of the Independent Offices Appropriations Act of 1970, P. L. 91-556. The Act prohibits GSA from paying rent for leases of space for the accommodation of federal agencies in buildings which are to be erected by the lessor for such agencies where the estimated cost of construction exceeds $200,000, unless the Congress has approved the lease. A true and correct copy of pages 8, 9 and 10, Schedule D, of Solicitation No. NEG(70)-63 which contains on page 8 thereof the text of the statute, are attached hereto as Exhibit "A".

14. Gateway's proposal to erect a fifteen story building at a cost in excess of ten million dollars in which federal agencies will be the sole and exclusive tenants, will commit the United States to make rental payments prohibited by the aforesaid Act, since defendants neither sought nor obtained appropriate Congressional approval.

15. Defendants Kunzig, Sampson and Shipp acted capriciously, arbitrarily and unlawfully because with full

knowledge of the prohibitions of the aforesaid Act, they knowingly and willfully recommended, authorized or were otherwise instrumental in accepting Gateway's offer.

16. Plaintiff, whose offer was responsive to defendants' Solicitation, had a prospective beneficial business relationship with defendant GSA which has been irreparably damaged by defendants' illegal acceptance of Gateway's offer in derogation of his rights. Plaintiff is aggrieved and palpably injured by defendants' action.

COUNT II.

17. Plaintiff incorporates herein by reference thereto paragraphs 1 through 14 of Count I of this complaint.

18. In the alternative, Solicitation No. NEG(70)-63 required each prospective offeror to advise defendant GSA whether its proposal offered space in an *existing building* or whether it proposed the offering of space in a *new building* to be erected, which would necessitate defendant GSA's obtaining Congressional approval as required by the Independent Offices Appropriations Act.

19. Notwithstanding the prohibitions contained in the aforesaid Act, defendants nevertheless, capriciously, arbitrarily and unlawfully specially interpreted the Act by erroneously defining the words ". . . which are to be erected by the lessor . . ."

20. As will more fully appear by reference to Exhibit "A", the defendants by their aforesaid interpretation excluded from the above-quoted statutory language new buildings, the construction status of which, on the date of the issuance of the Solicitation, met the following conditions (hereinafter referred to as the "Five Conditions"):

i. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.

ii. Design was complete.

iii. Construction financing fully committed.

iv. A building permit for construction of the entire building . . . had been issued.

v. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into.

21. The language and intent of the Independent Offices Appropriations Act is clear and unambiguous. It prohibits defendant GSA from executing a lease with a lessor who is erecting a building to accommodate federal agencies without first obtaining Congressional approval. In the absence of any statutory authority, direction or mandate from the Congress, the defendants unlawfully inserted in the Solicitation, the foregoing erroneous interpretation.

22. Plaintiff is informed, believes and therefore avers that Gateway did not intend to construct a building for its own purposes without regard to the prospects of a government lease. On the contrary, it intended to erect the building proposed in its offer solely for the purpose of accommodating federal agencies as lessees.

23. Plaintiff is informed, believes and therefore avers that defendants Kunzig, Sampson and Shipp knew in advance of September 30, 1970, the date that the Solicitation was issued, that Gateway did not intend to construct a building unless it was assured of a government lease. Nevertheless, the said defendants for several months prior to September 30, 1970, assisted and counselled Gateway in

the circumvention of the aforesaid statutory prohibition by certifying compliance with the defendants' unlawful interpretation of the Act, the Five Conditions.

24. As a result of the foregoing, defendants Kunzig, Sampson and Shipp unlawfully decided not to submit Gateway's offer to the Congress for approval as mandated by the Act, unlawfully determined that Gateway's offer was responsive to the Solicitation, and unlawfully accepted Gateway's offer because Gateway had certified that the offer complied with the Five Conditions.

25. Plaintiff, whose bid was responsive to defendants' Solicitation, had a prospective beneficial business relationship with defendant GSA which has been irreparably damaged and harmed by defendants' acceptance of Gateway's offer in derogation of plaintiff's rights. Plaintiff is aggrieved and palpably injured by defendants' action.

COUNT III.

26. Plaintiff incorporates herein paragraphs 17 through 24 of Count II of this complaint.

27. In the alternative, defendant GSA unlawfully accepted Gateway's bid which was nonresponsive in a material respect. Gateway's offer and the documentation submitted in connection therewith failed to demonstrate compliance with defendants' Five Conditions which were contained in the Solicitation. A true and correct copy of that portion of Gateway's offer is attached hereto as Exhibit "B".

28. In an attempt to comply with condition (i) (quoted above in paragraph 20), Gateway represented in its bid that it had a beneficial interest in the real estate under an agreement with the University City Science Center (here

inafter UCSC), dated September 23, 1970, which was "in fact, an Agreement of Sale giving [Gateway] beneficial ownership." (Gateway Offer, Exhibit B, page 2.) It further represented that its interest was sufficient to enable it to start construction on September 30, 1970, the date of defendant GSA's Solicitation.

29. The foregoing representations are false. The true facts are:

(a) there is no agreement of sale between Gateway and UCSC dated September 23, 1970. Plaintiff is informed, believes and therefore avers that even at the present time, no such agreement has been concluded;

(b) as of September 30, 1970, neither Gateway nor UCSC owned the real estate upon which Gateway proposed erecting a building. Title was vested in the Redevelopment Authority of the City of Philadelphia (hereinafter "Authority"), and the City of Philadelphia, until April 8, 1971. On that date the Authority conveyed title to the premises to UCSC;

(c) Gateway submitted with its offer a lease dated September 23, 1970 (and not an agreement of sale) between UCSC (landlord) and Gateway (tenant) for a term of 50 years. Paragraph 25 of the lease expressly provided that it was made pursuant to the Redevelopment Contract between the UCSC and the Authority dated November 26, 1965 which expressly provided:

A. in paragraph 14, that UCSC shall not sell or lease any part of the project area without the written consent of the Authority, and

B. in paragraph 18, that construction may not commence until final plans, designs and specifications have been approved by the Authority.

As of September 30, 1970, the Authority had not approved the lease or plans and specifications. Therefore, neither UCSC nor Gateway had the right to commence construction as of that date.

(d) the Authority could not approve Gateway's plans and specifications because they conflict with and violate the Urban Development Plan with respect to the building height and provisions for parking;

(e) Gateway's lease contains a restrictive clause which prohibits the erection of a general office building. Paragraph 6 of the lease provides:

> The Demised Premises shall be occupied and used only for such purposes as will promote, encourage and stimulate scientific research, including research of the natural and social sciences and including provisions for offices and other facilities incidental to or in support of such scientific research. Every sublease shall contain a provision restricting the use as herein provided.

The agencies which defendant GSA proposes to locate in the building are not concerned in any way with scientific research.

30. In an attempt to comply with condition (ii) (quoted above in paragraph 20), Gateway represented that the design of the building which it proposed to construct was complete.

31. The foregoing representation is false. The true fact is that the drawings submitted with Gateway's offer are incomplete, are not the drawings on which the building permit was issued and do not provide the floor space required by the Solicitation. Moreover, there are no me-

chanical drawings, nor are there drawings for the ground floor or penthouse floor of the building.

32. In an attempt to comply with condition (iii) (quoted above in paragraph 20), Gateway represented that construction financing was fully committed. Gateway purported to submit with its offer, a letter of the First Pennsylvania Banking and Trust Co., dated September 16, 1970 which allegedly committed the bank to finance the construction of Gateway's building.

33. The foregoing representation is false. The true fact is that Gateway submitted with its offer a letter dated September 15, 1970 from the Provident National Bank (and not the First Pennsylvania Banking and Trust Company.) The letter does not fully commit Provident to provide the financing, since the commitment is subject to Gateway's supplying to Provident certain unspecified documentation. Neither Gateway nor Provident advised defendant GSA either that the unspecified documentation was supplied or that Provident's conditions had been satisfied.

34. In a attempt to comply with condition (iv) (quoted above in paragraph 20), Gateway represented that a building permit for construction of the "entire building" was issued by the City of Philadelphia on September 30, 1970.

35. The foregoing representation is false. The true facts are:

(a) the building permit for the "entire building", as issued, was invalid, because as of September 30, 1970, the City of Philadelphia held title to a portion of the real estate upon which Gateway proposed to construct its building. Gateway had no understanding, agreement or beneficial interest in those portions of the real estate to which the City held title:

(b) building permit No. 62752 submitted with Gateway's Solicitation indicated that additional build- permits for air conditioning, plumbing and electrical work were required. These additional permits were not supplied to defendant GSA. Gateway could not commence construction on September 30, 1970.

36. In an attempt to comply with condition (v) (quoted above in paragraph 20), Gateway represented in its bid that a firm construction contract was entered into September 30, 1970 between Gateway Center Corporation (owner) and Rosemont Construction Co. (Contractor).

37. The foregoing representation is false. The true facts are:

(a) Gateway Center Corp. and Rosemont Construction Co. have the same address, the same telephone number and have common ownership;

(b) Plaintiff is informed, believes and therefore avers that Rosemont Construction Co. has not undertaken any significant construction for more than ten years and did not have the capacity to do so;

(c) while the contract called for work to commence "immediately", no work had been performed by Rosemont nearly five months later when the bid to Gateway was announced;

(d) the construction contract could not be considered "firm" since the plans and specifications were incomplete as of September 30, 1970, as alleged above in paragraph 31.

38. Defendant Shipp acted unlawfully, arbitrarily and capriciously by:

(a) failing to assure himself and his superiors that acceptance of Gateway's offer was authorized by law;

(b) failing to determine the true facts and circumstances under which Gateway submitted its offer, and

(c) failing to safeguard the interest of the United States in contractual relationships in total dereliction of the duty imposed on him by federal regulations.

39. Defendant Sampson acted capriciously, arbitrarily and unlawfully by:

(a) failing to read the documentation submitted by Gateway in support of its representations;

(b) failing to investigate the patently untrue statements contained in Gateway's offer;

(c) concluding that the bid was responsive on the limited information before him;

(d) by reporting to defendant Kunzig that the building which Gateway proposed to construct was already in existence, when he knew or should have known that the site on which the building would be located was vacant land;

(e) recommending to defendant Kunzig that the Gateway bid be accepted when he knew or should have known that Gateway's offer required Congressional approval in accordance with the Independent Offices Appropriations Act.

40. Defendant Kunzig acted capriciously, arbitrarily and unlawfully by:

(a) approving the recommendation of defendant Sampson that the Gateway bid be accepted when he knew or should have known that the acceptance of Gateway's offer required Congressional approval in accordance with the Independent Offices Appropriations Act;

(b) authorizing defendant Sampson to accept Gateway's offer in contravention of applicable laws and regulations of the United States, and

(c) failing to fulfill his duty to protect the public interest by rejecting the Gateway bid as nonresponsive.

41. Plaintiff, whose bid was responsive to defendants' Solicitation, had a prospective beneficial business relationship with defendant GSA which has been irreparably damaged by defendants' acceptance of Gateway's offer in derogation of plaintiff's rights. Plaintiff is aggrieved and palpably injured by defendants' action.

42. By reason of the foregoing, plaintiff has suffered irreparable damage and harm and will continue to suffer the same in the future. His remedy at law is clearly inadequate.

43. Plaintiff is informed, believes and therefore avers that defendants' illegal acceptance of Gateway's bid requires the execution of a lease between the parties.

44. Unless enjoined by this Court, Gateway and defendant GSA will execute the lease contemplated by the acceptance by defendant GSA of Gateway's offer.

45. Plaintiff is informed, believes and therefore avers that the illegal acceptance by defendant of Gateway's offer or the lease between the parties, or both, contemplate numerous consultations between Gateway and defendant GSA with respect to defendant GSA's particularized requirements and needs in the building which it has or will lease from Gateway. Specifically, plaintiff is informed, believes and therefore avers that the aforesaid lease will require defendant GSA to consult with Gateway with respect to partition requirements of the individual agencies to be housed in the said building.

46. Unless enjoined by this Court, defendant GSA may consult, communicate and otherwise encourage Gateway in the construction of the building to accommodate the federal agencies who will be the sole tenants.

WHEREFORE, Plaintiff, John W. Merriam, respectfully prays the Court, as follows:

(a) to issue an order preliminarily, and after final hearing, permanently enjoining defendant GSA from executing the lease contemplated by the defendants' acceptance of Gateway's offer on or about February, 1971;

(b) to issue an Order preliminarily restraining defendants Kunzig, Sampson, Shipp and GSA and its agents and employees from consulting, communicating, advising, encouraging or otherwise contacting Gateway Center Corp. with respect to its offer or any lease which may have been executed in pursuance thereto, pending the outcome of this litigation;

(c) to declare the acceptance of Gateway's offer, null and void of no binding effect on either party thereto;

(d) to declare the offer of Gateway Center Corp. non-responsive to Solicitation No. NEG(70)-63;

(e) in the alternative, to issue a writ of mandamus, compelling defendant Kunzig to cancel, void or otherwise nullify the acceptance of Gateway's offer, and to declare the same non-responsive;

(f) to direct the defendants to proceed forwith with a reconsideration of the offer of any offeror (excluding Gateway Center Corp.) which was responsive as of October 13, 1970, the date on which the bid period closed;

(g) to direct the defendants to accept only an offer which is responsive to the terms of the Solicitation and to direct that all subsequent proceedings and determinations be conducted strictly in accordance with the applicable federal statutes and the rules and regulations respecting the leasing of space by the United States, and

(h) such further Order as justice and the circumstances of this cause may require.

C. CLARK HODGSON, JR.,
C. Clark Hodgson, Jr.,
Attorney for Plaintiff.

Of Counsel:
STRADLEY, RONON, STEVENS
AND YOUNG,
1300 Two Girard Plaza,
Philadelphia, Penna. 19102

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 71-2262.

JOHN W. MERRIAM,

v.

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, A. J. SAMPSON, COMMISSIONER, PUBLIC BUILDING SERVICE OF THE GENERAL SERVICES ADMINISTRATION, L. M. SHIPP, JR., ASSISTANT COMMISSIONER, SPACE MANAGEMENT OF THE GENERAL SERVICES ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA.

MOTION TO INTERVENE.

1. GATEWAY CENTER CORPORATION is a Pennsylvania corporation having its principal place of business at 1030 East Lancaster Avenue, Rosemont, Pennsylvania 19010. The GATEWAY CENTER CORPORATION moves this Court to permit it to Intervene as a Party Defendant in this action.

2. JOHN W. MERRIAM, the Plaintiff herein, is an individual residing in Montgomery County, Pennsylvania, which is located within the Federal Judicial District known as the Eastern District of Pennsylvania.

3. The Defendant ROBERT L. KUNZIG is the former Admistrator of the General Services Administration of the United States of America (hereinafter "GSA"). The

Defendant A. J. SAMPSON was formerly the Commissioner of the Public Building Service of the GSA. The applicant is informed, believed and therefore avers that the Defendant L. M. SHIPP, JR., was formerly Assistant Commissioner of the GSA. The Defendant GENERAL SERVICES ADMINISTRATION is an agency of the United States Government.

4. On February 18, 1971, the Defendants accepted, on behalf of the United States Government, the offer extended by Applicant GATEWAY CENTER CORPORATION to lease office space to the United States Government in an office building which was to be constructed by the Applicant GATEWAY CENTER CORPORATION at 36th and Market Streets, Philadelphia, Pennsylvania. The Plaintiff contends that the Defendants' acceptance of Applicant GATEWAY CENTER CORPORATION's offer was illegal. The validity of the award of this contract to the Applicant GATEWAY CENTER CORPORATION, and the payment of rents under the lease signed pursuant thereto, constitute the subject matter of this action.

5. The Court's disposition of this action may, as a practical matter, impair and impede the Applicant GATEWAY CENTER CORPORATION's ability to protect its interest by declaring unlawful the Defendants' acceptance of Applicant's offer and enjoining the United States Government from moving its offices into Applicant's office building or paying rent to Applicant GATEWAY CENTER CORPORATION.

6. The interests of the Defendants and the Applicant are not the same since Defendants are required to obtain office space somewhere in Philadelphia, while Applicant must find a tenant for its office building.

7. The interest of Applicant GATEWAY CENTER CORPORATION is not adequately represented by the existing parties.

8. This Motion to Intervene is not opposed by any of he existing parties.

WHEREFORE, the Applicant GATEWAY CENTER CORPORAION prays this Court to grant its Motion and permit it to ntervene as a Party Defendant in this action.

OBERMAYER, REBMANN, MAXWELL & HIPPEL,

By: JOHN P. McKELLIGOTT,
John P. McKelligott, Esquire,

By: DAVID F. MAXWELL,
David F. Maxwell, Esquire,
Attorneys for Applicant.

DATED: June 26, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 71-2262.

JOHN W. MERRIAM

v.

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, A. J. SAMPSON, COMMISSIONER, PUBLIC BUILDING SERVICE OF THE GENERAL SERVICES ADMINITRATION, L. M. SHIPP, JR., ASSISTANT COMMISSIONER, SPACE MANAGEMENT OF THE GENERAL SERVICES ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA

and

GATEWAY CENTER CORPORATION.

ANSWER.

FIRST DEFENSE.

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE.

The allegations contained in Paragraphs 1, 3, 5, 44 and 46 of the Complaint are hereby admitted. The allegations

ontained in Paragraph 2 of the Complaint are denied, ince the Plaintiff has stated the former positions of these)efendants. The allegations contained in Paragraphs 11 hrough 16, inclusive, 19 through 25, inclusive, 27, 29, 31, 3, 35, 37 through 43, inclusive, and 45 of the Complaint re hereby denied.

The Defendant does not have sufficient information to orm a belief as to the truth of the allegations contained n Paragraphs 4, 8 and 9 of the Complaint, and it therefore lenies them. Strict proof, if material, is demanded at rial.

In response to the allegations contained in Paragraphs , 7 and 18 of the Complaint, the Defendant states that olicitation for Offers NEG (70)-63 speaks for itself. A rue and correct copy of the aforesaid Solicitation for)ffers is attached hereto, incorporated herein by reference, nd marked Exhibit "A".

In response to the allegations contained in Paragraphs 0, 28, 30, 32, 34, and 36 of the Complaint, the Defendant esponds that the offer of Gateway Center Corporation peaks for itself. A true and correct copy of the aforesaid)ffer is attached hereto, incorporated herein by reference, nd marked Exhibit "B".

In response to the allegations contained in Paragraph 7 of the Complaint, the Defendant re-alleges each and very allegation contained in Paragraphs 1 through 14, in-lusive, of this Answer and incorporates them herein by eference.

In response to the allegations contained in Paragraph 6 of the Complaint, the Defendant re-alleges each and very allegation contained in Paragraphs 17 through 24, nclusive, of this Answer and incorporates them herein by eference.

WHEREFORE, the Defendant, Gateway Center Corporation, prays this Court to render judgment in its favor, and against the Plaintiff.

OBERMAYER, REBMANN, MAXWELL & HIPPELL,

By: .....
John P. McKelligott, Esquire

By: .....
David F. Maxwell, Esquire

ADDITIONAL STATUTES INVOLVED.

Independent Offices Appropriations Act of 1970, 83 Stat. 1221.1.

No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies and buildings and improvements which are to be erected by the lessor for such agencies at an estimated cost in excess of $200,000 . . . *Provided* that the foregoing proviso shall not be applicable projects for which a prospectus for the lease construction of space has been submitted to the Congress and approval made in the same manner as for the public buildings construction projects pursuant to the Public Buildings Act of 1959.

Public Buildings Act of 1959, 40 U. S. C. § 606.

Approval of proposed projects by Congress—Limitation of funds; transmission to Congress of prospectus of proposed project

(a) In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 603 of this title, no appropriation shall be made to construct any public building or to acquire any building to be used as a public building involving an expenditure in excess of $100,000, and no appropriation shall be made to alter any public building involving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the

Senate and House of Representatives, respectively, and such approval has not been rescinded as provided in subsection (c) of this section. For the purpose of securing consideration of such approval the Administrator shall transmit to Congress a prospectus of the proposed project, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, or acquired under this chapter;

(2) the location of the project, and an estimate of the maximum cost of the project;

(3) a comprehensive plan for providing space for all Government officers and employees in the locality of the proposed project, having due regard for suitable space which may continue to be available in existing Government-owned buildings and in rented buildings;

(4) a statement by the Administrator that suitable space owned by the Government is not available and that suitable rental space is not available at a price commensurate with that to be afforded through the proposed action; and

(5) a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed, altered, or acquired.